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May 21, 2004

EX PARTE COMMUNICATION

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: **Amplification of APCC's Views on AT&T's Petition for Reconsideration, Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128**

Dear Ms. Dortch:

On behalf of the American Public Communications Council ("APCC"), this letter amplifies APCC's views on AT&T's petition for reconsideration or clarification of the Commission's Report and Order in this proceeding, FCC 03-235 (rel. October 3, 2003)("*Order*"). AT&T requests the Commission to rule that a switch-based reseller ("SBR") can obtain relief from the system audit required by the Commission's dial-around compensation rules, as amended by the *Order*, without the consent of payphone service providers ("PSPs"), by entering an agreement with the SBR's Intermediate Carrier ("IC") whereby the IC pays compensation on behalf of the SBR for 100% of the toll-free calls that the IC terminates to the SBR's switch. *See* AT&T, Petition for Reconsideration or, in the Alternative, Clarification, filed December 8, 2003, at 4-6.

At the outset, we stress that granting APCC's request, in its Petition for Clarification or Partial Reconsideration, filed December 8, 2003, for a ruling that ICs are the "default" payers of compensation in the event that a SBR does not file a system audit report is the minimum the Commission must do to ensure that PSPs are "fairly compensated." 47 U.S.C. §276(b)(1)(A). Granting APCC's Petition would simplify and facilitate both the determination of who has ultimate compensation liability and the resolution of compensation disputes.

If the Commission denies APCC's Petition, then the Commission must take other steps to improve the likelihood that PSPs will be fairly compensated for every SBR call. In general, the type of IC-SBR agreement described in AT&T's petition, whereby the IC undertakes to pay for 100% of the calls terminated to the IC switch, will simplify the compensation process and increase the likelihood that PSPs will be fairly compensated for every SBR call. The Commission should encourage such agreements, subject to conditions necessary to ensure that the IC actually does compensate the PSP for 100% of the calls.

These conditions are:

- An IC that agrees to pay compensation on 100% of the calls terminated to the SBR switch must actually pay compensation on 100% of the calls, and may not subsequently "take back" some of the compensation paid.

- The IC must inform PSPs of the initiation or termination of such IC-SBR agreements (and the substance of those agreements) no later than 30 days prior to beginning of the first quarter in which calls are made to which the agreement applies or ceases to apply.

- IC-SBR agreements to pay on 100% of the calls terminated to the SBR switch must take effect at the beginning of a calendar quarter.

- When an IC's agreement to compensate PSPs for 100% of the calls delivered to the SBR switch expires or is terminated, the SBR must promptly comply with its payment obligations under the rule, and with the associated audit, certification, and reporting requirements.

A. An IC that undertakes to pay compensation on 100% of calls delivered to the SBR may not "take back" or withhold a portion of the compensation

AT&T's petition contends that PSPs' consent should not be required for an IC's agreement to compensate on 100% of the calls terminated to the SBR's switch because it would be unreasonable for the PSP to withhold consent to being paid for all the calls. This is true, provided that the PSP actually is paid on 100% of the calls terminated to the SBR's switch. Consistent with their undertaking to compensate PSPs on 100% of the calls, IC's should not be permitted to "take back" or withhold compensation for any dial-around calls actually placed from payphones and delivered to a SBR's switch.

Under the current rule, under which ICs have the obligation to compensate PSPs for completed SBR calls, PSPs have been subjected to peremptory "takebacks" of compensation by ICs if the SBR reports that it actually completed fewer calls than the number for which the IC initially paid. These takebacks are extremely disruptive and economically injurious to PSPs. *See* "Carrier 'Takebacks' of Previously Paid Compensation," Letter to Jeffrey Carlisle, Deputy Chief, Wireline Competition Bureau, from Albert H. Kramer and Robert F. Aldrich, April 15, 2004 (Attachment 1 to this letter). The ICs claim to be justified in "taking back" compensation because, at the time of payment, they lack full information about whether calls are compensable.

Under the new rule, where an IC undertakes to compensate PSPs on 100% of the calls terminated to the SBR switch, there can be no justification for "takebacks" because the IC clearly has the ability to make a timely determination, based on its own tracking information, how many compensable calls there are.[1] Nor is there any justification for the IC to "take back" payments because it claims it was unable to recover the payments from surcharges assessed on the SBR. It is the IC's choice to enter the track-and-pay agreement with the SBR. As a condition of entering that agreement, the IC has every opportunity to investigate the SBR's creditworthiness, insist upon escrow deposits if necessary, etc. By contrast, the PSP has no opportunity to protect itself because it has no contract with the SBR and no ability to block dial-around calls to the SBR.

Further, the IC must not be allowed to withhold payment from the PSP for calls delivered to the SBR switch, whether or not the IC has collected a payphone surcharge from the SBR at the time that payment to the PSP is due. If the IC undertakes to pay for 100% of the calls delivered to the SBR switch, then it must abide by that agreement.

Therefore, the Commission should rule that:

- An IC that agrees to pay compensation on 100% of the calls terminated to the SBR switch must actually pay compensation on 100% of the calls, and may not subsequently "take back" some of the compensation paid.

B. An IC that undertakes to pay compensation instead of a SBR must promptly notify PSPs of the initiation and termination of the arrangement

Where an IC agrees to pay compensation on 100% of the calls terminated to a SBR switch, without the prior consent of PSPs, it is critical that PSPs be given timely notification of the initiation and termination of such an arrangement. PSPs must be given timely notice of which ICs are undertaking to pay for calls to which SBRs, and the terms of those agreements, so that they can make arrangements to collect compensation from those SBRs that have not entered such agreements.

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[1] Of course, the IC's tracking and payment system must be subject to an audit to ensure that it is reliable. A major IC such as AT&T will have undergone an audit of its "Completing Carrier" tracking and payment system to comply with the new rules. The same auditor should be able to evaluate the carrier's "Intermediate Carrier" tracking and payment system as well. Neither the Commission's new compensation rule nor AT&T's proposal, however, explicitly requires an IC to undergo an audit of its role in tracking and payment of compensation owed by SBRs, although we believe it is clearly implicitly required by the new rule. Further, there may be some ICs that act solely as ICs, handing all their payphone-originated calls off to SBRs. Accordingly, the Commission should clarify that an IC that enters an agreement to track and pay calls "on behalf of" a reseller must undergo an audit of its tracking and payment system.

Furthermore, it is critical for PSPs to be promptly notified if an IC-SBR agreement expires or is terminated, so that PSPs can make arrangements to collect their compensation directly from the SBR once the agreement is no longer in effect.[2]

Therefore, the Commission should rule that:

- The IC must inform PSPs of the initiation or termination of such IC-SBR agreements (and the substance of those agreements) no later than 30 days prior to beginning of the first quarter in which calls are made to which the agreement applies or ceases to apply.

C. IC-SBR agreements to pay on 100% of the calls terminated to the SBR switch must take effect at the beginning of a calendar quarter

IC-SBR agreements must be implemented in an orderly fashion. It would be very disruptive to the compensation process if IC-SBR agreements are initiated or terminated in the middle of a quarter.

Therefore, the Commission should rule that:

- IC-SBR agreements to pay on 100% of the calls terminated to the SBR switch must take effect at the beginning of a calendar quarter.

D. If the SBR-IC agreement is terminated or broken, then the SBR must promptly comply with its payment obligations as well as the audit, certification, and reporting requirements of the new rule

Finally, the Commission must make clear that, when and if the IC-SBR agreement ceases to be operative, either because it expires or because one party exercises a right to terminate the agreement, the SBR must promptly comply with its payment obligations under the rule, and with the associated audit, certification, and reporting requirements. Otherwise, PSPs would be left in a state of limbo with no assurance whatsoever that they will be paid compensation. Therefore, the Commission should rule that:

- When an IC's agreement to compensate PSPs for 100% of the calls delivered to the SBR switch expires or is terminated, the SBR must promptly comply with its payment obligations under the rule, and with the associated audit, certification, and reporting requirements, at the times and in the manner required by the new rule.

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[2] Of course, the termination of the agreement would trigger immediate application of the audit and certification requirements of the rule to the SBR. *See* discussion below.

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E. General Observations

The Commission particularly needs to address these points because, in footnote 3 of its petition, AT&T mentions that "any IXC who agrees to accept the tracking and reporting payment requirements on behalf of a SBR would act as its conduit, not its guarantor." AT&T Petition at 4-5, n. 3. This comment could be interpreted to mean that the IC has no obligation to actually deliver on its undertaking to pay the PSP for 100% of the calls delivered to the SBR. If so, then that undertaking is an empty promise. The record of this proceeding is replete with evidence of SBR evasion of their payment obligations under the prior rule. *See, e.g.*, Comments of APCC, filed June 23, 2003, Exh. 2 (Declaration of Ruth Jaeger), Exh. 3 (Declaration of Arthur Cooper); Reply Comments of APCC, filed July 3, 2003, Exh. 1 (Declaration of Allan C. Hubbard). That is why, in its adoption of a new SBR-pays rule, the Commission adopted audit, certification, and reporting requirements designed to ensure that SBRs actually took responsibility for implementing their compensation obligations. In the absence of these safeguards, it could not be presumed that SBRs would comply with their payment obligation.

If SBRs are excused from compliance with the rule's safeguards based on an IC's undertaking to assume the tracking and payment functions, then PSPs must be able to rely on the IC's undertaking to act in the SBR's stead. Therefore, as long as the agreement is in effect, the IC must be subject to an enforceable requirement to make timely payments for 100% of the calls for which it has undertaken to pay.

Any other result would be inconsistent with the *Order*'s purpose to assign the compensation obligation to the entity that is in the best position to accurately track calls. *Order*, ¶¶26, 35. In this instance, the IC is clearly in the best position to track how many calls it terminates to the SBR switch. Relieving the IC of any liability to deliver on its assumption of payment responsibilities would reintroduce – in reverse – the very same separation of tracking functions and compensation liability that the Commission condemned in the *Order*. Under the current "interim" rules, the *IC* has the ultimate compensation obligation but must rely on the *SBR* to track calls to completion. The FCC has found this bifurcation of roles inappropriate. *Id.* Under AT&T's proposal, the *IC* would assume responsibility to perform all the tracking and administer payments. Failing to impose any obligation on the IC to actually make the payments would reintroduce the same separation of compensation liability and tracking responsibility that the FCC condemned would reemerge, but with the roles of ICs and SBRs reversed.

ICs should have no legitimate objection to accepting liability for the payments when they agree to compensate PSPs on 100% of calls terminated to the SBR switch. ICs' principal complaint under the current rule is that the IC is made liable for payment even though it lacks the ability to determine on its own whether calls are completed by the SBR. If the IC undertakes, with the agreement of the SBR, to compensate PSPs on 100% of the calls terminated to the SBR switch, then the IC has full control of the determination whether calls are "completed" for purposes of this payment arrangement. Because the IC can determine for itself whether the calls are compensable, the IC's liability for the payment raises none of the complications of which ICs complained under current rule.

Conclusion

Therefore, to ensure that PSPs are fairly compensated, the Commission should rule that, if an IC makes an agreement with a SBR to pay compensation on 100% of the calls terminated to the SBR switch, then the agreement may take effect without the consent of the PSP, and the following conditions apply:

- An IC that agrees to pay compensation on 100% of the calls terminated to the SBR switch must actually pay compensation on 100% of the calls, and may not subsequently "take back" some of the compensation paid.

- ICs and SBRs must inform PSPs of the initiation or termination of such IC-SBR agreements no later than 30 days prior to beginning of the first quarter in which calls are made to which the agreement applies or ceases to apply.

- IC-SBR agreements to pay on 100% of the calls terminated to the SBR switch must take effect at the beginning of a calendar quarter.

- When an IC's agreement to compensate PSPs for 100% of the calls delivered to the SBR switch expires or is terminated, the SBR must promptly comply with its payment obligations under the rule, and with the associated audit, certification, and reporting requirements, at the times and in the manner required by the new rule.

Sincerely,

Robert F. Aldrich

Albert H. Kramer
Robert F. Aldrich

Enclosure
cc: Jeffrey Carlisle
Bill Dever
Darryl Cooper
Denise Coca